Becker Group, Inc., Urethane Division *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Case 7–CA–39059

September 9, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On January 15, 1998, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

Our dissenting colleague dissents from the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Carl Jennings and Annie O'Neal on October 1, 1996.[3] We agree with the judge.

Background

Carl Jennings and Annie O'Neal were vigorous and open union supporters in the Respondent's facility. An election was held on July 11, and the Union was certified on July 19. Negotiations for an initial contract were scheduled to begin on October 2. The Respondent's employees elected Jennings to be a member of the Union's bargaining committee, and they elected O'Neal to be a steward. On October 1, the eve of the beginning of negotiations for an initial contract, three of the Union's four employee representatives in the plant, Jennings, O'Neal, and bargaining committee member Annette Cooper, were discharged by the Respondent.

Jennings' Discharge

On September 30, Jennings and Cooper met with the Respondent's human resources manager, Anne Ventimiglio-Esser, to discuss whether she had received from the Union a letter naming the members of the Union's bargaining committee. Ventimiglio-Esser acknowledged that she had received it. After the meeting ended, Jennings reported to work 2 hours ahead of schedule. While working on this shift, Jennings made several mistakes operating a water jet machine used to cut automobile doors. Jennings also took several breaks apart from those working on his production line, and he punched out 2 hours before the production line's shift ended in order to ride home with Cooper, whose shift had already ended.

As Jennings punched out, Supervisor Mark Smith asked Jennings where he was going. Jennings explained that he had already worked 8 hours, and that staying until the end of the production line's shift would entail working for 10 hours. Smith instructed Jennings to come into Smith's office. Cooper followed Jennings into Smith's office in order to serve as Jennings' union representative. Smith angrily told Cooper to leave. Cooper responded that she was there to represent Jennings. Smith stated that there was no union, and again told her to get out of his office. Cooper reminded Smith that the Union had been certified, and Smith responded by telling her that the Union did not have a contract. Cooper told Smith that Jennings nevertheless had the right to union representation at this meeting. Smith acquiesced and allowed Cooper to stay.

Smith then handed three disciplinary warnings to Jennings to sign. Smith had previously prepared and showed these warnings to Union Steward Barbara Stephens. These warnings admonished Jennings for taking unauthorized breaks, for not doing his work properly, and for refusing to follow Smith's instructions to take breaks at the same time as the others on his shift. Jennings read the warnings, stated they were not true, and refused to sign them. Smith responded by requesting that Jennings sign the warnings, and Cooper interjected that it was Jennings' right not to sign them. Smith then gave Jennings a copy of the Respondent's work rules, and told Jennings that the copies of the warnings were for him. Cooper picked up the warnings and the work rules, stated that they would take care of the matter in the morning, and—together with Jennings—left the office. In this meeting, Smith made no mention about the possibility of any further discipline.

Moments later, as Jennings and Cooper were leaving the facility, they had a confrontation with shop steward Stephens about the warnings Jennings had received. All three used abusive language during this confrontation. The record shows that employees regularly used, and the Respondent tolerated, vulgar language and gestures in the facility. After the confrontation ended, Jennings and Cooper departed from the facility.

Immediately thereafter, Smith asked Stephens about the incident. Smith then prepared two additional warnings for Jennings. One warning was for punching out at 10:30 p.m., the other was for using the vulgar language and gestures towards Stephens. In addition, Smith prepared two statements in support of the above warnings.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center,* 321 NLRB 144 (1996), and *Excel Container, Inc.,* 325 NLRB 17 (1997).

[3] All dates are in 1996 unless stated otherwise.

One of these statements also included a recommendation that Jennings be discharged.

The following day, the Respondent terminated both Jennings and Cooper.

We agree with the judge that the Respondent unlawfully discharged Jennings. The General Counsel has established a prima facie case, under *Wright Line*,[4] that the Respondent's union animus was a motivating factor in its decision to terminate Jennings. Indeed, Smith's remark at the disciplinary meeting with Jennings and Cooper—that Cooper should leave because there is no union at the Respondent's facility—reveals, at a minimum, his dismissiveness, if not hostility, towards the Union's representation of the Respondent's employees.[5] Smith's union animus is further revealed by the fact that, after the meeting concluded, Smith wrote up two additional warnings for Jennings and a recommendation that he be discharged. One of these warnings, for punching out early, involved an incident that occurred *prior* to the disciplinary meeting, yet was not mentioned during the meeting as a possible ground for discipline. The other warning, for using profane language and gestures, involved conduct that the Respondent regularly tolerated in its facility among both its employees and supervisors. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing this warning to Jennings, and that it was pretextual as a reason for Jennings' discharge. As noted by the judge, the record is replete with evidence that the use of profanity and obscene gestures between employees, and even between supervisors and employees, is rampant at the facility.[6]

In addition, the Respondent's union animus is shown by its discharge of Cooper the following day, which, as the judge found, and as our colleague agrees, was unlawfully motivated and violative of Section 8(a)(3).[7] Moreover, it is significant that Jennings—an open union advocate who had just announced to the Respondent that he was a member of the Union's bargaining committee—was discharged along with two other union representatives on the eve of negotiations for an initial contract. In view of these facts, we agree with the judge that the General Counsel has sustained his burden of showing that antiunion considerations were a motivating factor in the decision to discharge Jennings.

We also agree with the judge that the Respondent has not sustained its burden, under *Wright Line*, of showing that it would have discharged Jennings even in the absence of the union activities. Had there been evidence that the Respondent was in fact considering a discharge for Jennings' conduct when Smith prepared the written warnings, we might give more credence to the Respondent's contention that Jennings would have been discharged even absent his union activity. However, there is nothing in the record showing that Smith actually considered recommending the discharge of Jennings for these offenses prior to Jennings' seeking union representation in his meeting with Smith. To the contrary, we find, in agreement with the judge, that the evidence leads inescapably to the conclusion that only counseling had been considered prior to the meeting. Although Smith testified that it was his intention to discuss Jennings' conduct with management at some point in time after his meeting with Jennings, such testimony does not show that a discharge was under consideration prior to the meeting. Indeed, when Smith presented the three warnings to Jennings, he in no way indicated that there was a possibility of any further disciplinary action, much less a discharge.[8] With respect to the fourth warning, for punching out early, Smith apparently did not view this conduct as serious enough to warrant mentioning it during his disciplinary meeting with Jennings.[9] Further, Smith's attempt to bolster his discharge recommendation by issuing an additional warning for conduct that the Respondent regularly tolerated in the plant (i.e., obscene language and gestures) creates an additional basis for finding that the conduct underlying the warnings was not the real reason for the discharges and casts additional doubt as to whether the Respondent would have discharged Jennings in the absence of union activity. In these circumstances, we agree with the judge that the Respondent has failed to sustain its burden of showing by a preponderance of the evidence that Jennings would have been terminated even absent the union activity.

In contending that Jennings' discharge is lawful, our dissenting colleague concedes that Smith's remarks at the meeting with Cooper and Jennings demonstrate antiunion animus, but he attaches no significance to the remarks because—in his view—they demonstrate animus only to Cooper, not to Jennings. We find no support for this contention. First, by its own terms, Smith's statement, that there is no union, reflects a general animus towards the Union's representation of the Respondent's employees. The statement cannot reasonably be construed as pertaining only to union activity by Cooper.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] We agree with the judge that this remark violated Sec. 8(a)(1) of the Act.

[6] We also note that the judge discredited Stephens' testimony that Jennings grabbed his crotch during the argument.

[7] We agree with, and thus adopt, the judge's findings concerning Cooper's discharge.

[8] We also find unavailing Smith's testimony that he would not "typically" tell employees what their discipline is going to be before discussing it with the human resources department and the plant manager. Such testimony does not indicate that Smith "typically" would discharge an employee after leading the employee to believe that no further discipline was contemplated, as he did here with Jennings.

[9] In view of the fact that this infraction was never mentioned during the disciplinary meeting, we find no merit to our dissenting colleague's assertion that this infraction caused the Respondent to hold the disciplinary meeting in the first place.

Second, our colleague's contention ignores the fact that Jennings was a known union activist, was a known member of the bargaining committee, and had injected the Union's presence into this meeting by having Cooper act as his union representative in this matter. Significantly, acceptance of our colleague's contention would also require us to dismiss as mere coincidence the fact that the Respondent terminated three union representatives on the day before negotiations were to commence.

We also find no merit to our colleague's reliance on the judge's finding that some of these infractions could be legitimate grounds for discharge. That some of these warnings involved conduct which could be sufficient grounds for discharge does not establish that the Respondent indeed *would* have discharged Jennings for these violations absent the union activity. Indeed, once a prima facie case has been established, the Respondent does not meet its burden merely by showing that it would have been reasonable to discharge Jennings for the violations of the work rules. Rather, the Respondent must affirmatively show that such action would have been taken in any event. *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). As stated above, the Respondent has not shown by a preponderance of the evidence that it was even considering, much less that it would have, in fact, discharged Jennings for the violation of the work rules on September 30.

Further we find no merit to our colleague's assertion that it was the accumulation of offenses rather than Jennings' union activity that resulted in his discharge. In these circumstances, where there is no evidence suggesting that discharging Jennings had been considered prior to issuing the pretextual warning to Jennings for using profane language and gestures, there simply is no reasonable basis for concluding that the Respondent discharged Jennings for an accumulation of offenses.

Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Jennings on October 1.

O'Neal's Discharge

As noted above, Annie O'Neal was an open and active union supporter, had been elected shop steward by her fellow employees, and was one of the three union representatives fired by the Respondent on October 1. When O'Neal arrived for work that morning, O'Neal was talking to employee Nikki Wallace as the two went to punch in before the beginning of their shift. As the two were talking, employees Donna Williams, Tinelda Williamson, and Linda Young arrived. As those three went to punch in, O'Neal told them they were cutting in. Williamson responded that O'Neal was just talking. As Williamson spoke, O'Neal punched in. O'Neal then observed Williams punch in. Williamson then told O'Neal that she was going to a gas station with Williams and Young, and asked O'Neal to put their timecards with hers in the rack. O'Neal complied with the request and placed the three cards in a slot together with her own card. O'Neal then went to work.

Later that morning, O'Neal met with the Respondent's production manager, Michael Zelenock, and Human Resources Director Ventimiglio-Esser. Employee Annie Pearl Smith was also there acting as an alternate steward. At this meeting, Ventimiglio-Esser told O'Neal that Supervisor Marc Fortin had observed her punching in the timecards of other employees. O'Neal requested that Fortin be brought into the meeting. When Fortin arrived, O'Neal asked Fortin if he had claimed to see O'Neal punching other employees' timecards. Fortin lowered his head and mumbled something that was not understandable. Smith then asked Fortin why he did not say anything to O'Neal when he observed her punching the timecards. Ventimiglio-Esser answered that Fortin was not obligated to say anything until she got there because she was the "Human Resource." Smith asked Fortin how he could have seen O'Neal punch the cards, and Fortin answered that he saw her with the cards in her hands. O'Neal then told Ventimiglio-Esser that this was a lie, but Ventimiglio-Esser responded that she was not there and "this is what they told her."

O'Neal and Smith then went to meet with the Respondent's plant manager, Alex Risca. Risca told them that all of his subordinates had recommended O'Neal be terminated and he was following their recommendation. As she left the plant, O'Neal had a conversation with a number of employees about her termination, including Wallace, Williams, and Williamson. The three of them remarked that they had punched their own timecards, and that no one from management had spoken to them about this.

On October 28 and 29, respectively, employees Young and Williamson gave written statements to Ventimiglio-Esser that corroborated O'Neal's version of the events.[10]

We agree with the judge for the reasons he states that the Respondent unlawfully terminated O'Neal. As noted above, O'Neal was one of three visible union supporters terminated on the eve of negotiations. Although the Respondent accused O'Neal of violating one of its work rules by punching in the timecards of other employees, the Respondent conducted no investigation of the matter prior to terminating O'Neal and, in fact, did not ask the other employees involved about the matter until almost a month later. In addition, at trial the Respondent adduced and relied on the incredible testimony of Williamson, who testified—in complete contradiction to her original statement—that she, Young, and Williams found their timecards punched when they arrived for work that day.

[10] Williamson testified at the hearing in contradiction to the statement she gave to Ventimiglio-Esser. As noted below, that testimony was not credited.

Similarly, the Respondent relied on the discredited testimony of Supervisor Fortin, who said he saw O'Neal with the timecards in her hand. As the judge persuasively reasoned, for the Respondent to truly believe these accusations, it would have had to conclude that O'Neal randomly selected these three timecards and punched them in without knowing whether these employees would report for work that day. We agree with the judge that such a conclusion defies logic. Importantly, there is no evidence of other employees being fired for punching another employee's timecard, even though this had been a problem at the facility for some time. Further casting doubt on the Respondent's contention is the fact that it took no corrective action after receiving statements from two of the employees involved that corroborated O'Neal's version of the matter. In view of these considerations, and in view of the Respondent's animus as demonstrated in the meeting with Jennings and Cooper, we find—in agreement with the judge and contrary to our dissenting colleague—that the General Counsel established a prima facie case that O'Neal's termination was motivated by antiunion considerations and was thus part of an attempt by the Respondent to weaken the Union's bargaining strength and credibility with employees on the eve of negotiations. We also find from the foregoing facts that the Respondent has failed to show that O'Neal would have been terminated even absent her union activity.

We find unpersuasive our dissenting colleague's contention that there is no nexus between the Cooper-Jennings incident (discussed above) and O'Neal's discharge, and thus there is no showing that O'Neal's discharge was motivated by antiunion animus. First, our colleague's contention ignores the significant fact that the Respondent discharged three visible union officials the day before negotiations were to commence. Second, our colleague's contention ignores the facts, set forth above, showing that the Respondent's reason for terminating O'Neal is pretextual.[11]

Accordingly, we adopt the judge's finding that the Respondent's discharge of O'Neal violated Section 8(a)(3) of the Act as alleged.

ORDER

The Respondent, Becker Group, Inc., Urethane Division, Sterling Heights, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad no-solicitation/no-distribution work rule.

(b) Stating to unit employees that there is no union representation at the Respondent's Urethane Division facility.

(c) Laying off unit employees without providing the Union with notice and the opportunity to bargain over these layoffs.

(d) Issuing disciplinary actions to and discharging its employees because they engage in activity protected by Section 7 of the Act.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, formally rescind in writing its overly broad no-solicitation/no-distribution rule in effect from April 1996 through March 12, 1997, and post a notice that this has been done.

(b) Within 14 days from the date of this Order, offer Michael Hooper, Kenny Smith, Nicole Wadley, and Latonia Ware full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, offer Annette Cooper, Carl Jennings, and Annie O'Neal full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Michael Hooper, Kenny Smith, Nicole Wadley, and Latonia Ware whole for any loss of earnings and other benefits suffered as a result of their unlawful layoff, in the manner set forth in the remedy section of the judge's decision.

(e) Make Annette Cooper, Carl Jennings, and Annie O'Neal whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings and discharges, and, within 3 days thereafter, notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Sterling Heights, Michigan, copies of the

[11] Our colleague mischaracterizes our finding as one that second-guesses the Respondent's decision to believe the reports that O'Neal had punched the timecards of other employees. A finding, as here, that the asserted reason for discharge is pretextual is not tantamount to second-guessing the employer's decisions, but rather means that "the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1996.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

I agree with the judge that the Respondent violated Section 8(a)(1) by maintaining an overly broad no-solicitation rule, and Section 8(a)(5) by laying off employees in July 1996 without giving the Union notice or an opportunity to bargain. As discussed below, I also agree that the Respondent violated Section 8(a)(1) and (3) by its statement to, and discharge of, employee Annette Cooper. Contrary to the judge, however, I do not find that the Respondent additionally violated Section 8(a)(3) by discharging employees Carl O'Neal and Annie Jennings. Accordingly, I would dismiss those allegations.

In order to establish a violation of Section 8(a)(3), the General Counsel must establish that the employer's action was motivated by antiunion animus. Thus, it is critical to show, inter alia, that there was such animus, i.e., a hostile attitude towards union activities. In addition, I believe that the General Counsel must show a nexus between any animus and the action taken.

In the instant case, the Respondent was neutral towards the Union's campaign. Although the Respondent committed violations after the certification of the Union, none of these established animus towards the union activities of O'Neal and Jennings. More particularly, the "no-solicitation" and "unilateral layoff" violations were not aimed at O'Neal and Jennings. Thus, they do not supply the requisite "animus" needed to establish a prima facie case of unlawful discharge of those two employees. In addition, the "no-solicitation" violation was based solely on the presence of a clause in the Respondent's work rules. The clause was neither unlawfully promulgated nor enforced. Further, neither O'Neal nor Jennings was among those affected by the 8(a)(5) layoff. And, of course, there was no allegation or evidence that the layoff was discriminatorily motivated, or that the individuals selected for layoff were targeted because of their union support or activities. In short, there is no indication that these violations had anything to do with the discharges of O'Neal and Jennings. Under these circumstances, I do not find that the "no-solicitation" and "layoff" violations establish the requisite element of "animus" necessary to establish prima facie 8(a)(3) cases as to O'Neal and Jennings.

I recognize that the Respondent violated Section 8(a)(1) when its business agent, Mark Smith, informed employee Cooper, who insisted on representing employee Jennings during a noninvestigatory meeting, that there was no union representation at the facility. However, Cooper immediately corrected Smith, and Smith replied that there simply was no union contract. I agree that the statement about "no union representation" was incorrect and unlawful. However, inasmuch as it was immediately corrected, and inasmuch as union representation did not entitle Cooper to be at the interview, I do not find that the statement establishes animus as to Jennings. Similarly, I agree that the discharge of Cooper was motivated by her effort to assist Jennings and was thus unlawful. But, it does not follow that the discharge of Jennings was unlawful.

Further, even assuming arguendo, without deciding, that the "animus" finding as to Cooper would also suffice as to Jennings, I find that the Respondent demonstrated that it nonetheless would have terminated Jennings, in any event, because of work infractions on September 30. In this regard, the judge found that Jennings received several warnings at the meeting on September 30, any one of which would have justified his termination under company rules. Thus, Jennings received written warnings at the meeting for tardiness, taking unauthorized breaks, and careless work. *After* receiving these warnings, Jennings was additionally warned for abandoning his work station. Further, Jennings subsequently committed an additional infraction based on his conduct toward Union Steward Barbara Stephens. Based on all of these infractions, I find that Jennings would have been terminated regardless of his union support or activities.

My colleagues note that the discharge occurred after the meeting at which Jennings requested union representation. However, this does not establish that the discharge was motivated by this request. Jennings had committed three offenses, and he received three warnings at the meeting. After the meeting, Jennings was given

[12] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

two more warnings for fourth and fifth offenses.[1] The General Counsel does not allege that any of the first four warnings was unlawful. The General Counsel does allege that the fifth warning (for abusive conduct toward Stephens) was pretextual and unlawful. As to this matter, I recognize that the warning issued to Cooper (for *her* conduct toward Stephens) was pretextual and unlawful. But, it does not follow that the warning *to Jennings* for this event was pretextual and unlawful. As noted above, Jennings (unlike Cooper) had committed four offenses and had been lawfully warned for each of them. Thus, it would seem nonpretextual and appropriate to warn Jennings for a fifth offense. Further, even assuming arguendo that the fifth warning to Jennings was unlawful, it does not follow that the discharge of Jennings was unlawful. As noted, Jennings had committed four offenses, any one of which would have justified discharge under company rules. In my view, it was the accumulation of offenses rather than the request for a union representative that resulted in the discharge.[2]

With respect to O'Neal, there is no nexus whatever between the "Cooper-Jennings" incident and O'Neal's discharge. Thus, the 8(a)(1) and (3) violations connected to that incident are not connected to the discharge of O'Neal.

Further, even assuming, arguendo, that "animus" had been shown as to O'Neal, so that there was a prima facie case, I find that the rebuttal evidence establishes that the Respondent disciplined O'Neal based on supervisory reports that she "clocked" in other employees, contrary to the Respondent's rules.[3]

My colleagues assert that Respondent could not "truly believe" the reports that O'Neal had "clocked in" for other employees. However, it is not for the Board to "second-guess" an employer's decision to credit (or discredit) reports of misconduct. The Board's only role is to determine whether the General Counsel has shown that the employer, *for discriminatory reasons,* chose to credit such reports. Absent that showing, it makes no difference whether the Employer was correct (or even reasonable) in crediting such reports.

Accordingly, I would dismiss the 8(a)(3) allegations as to employees O'Neal and Jennings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain an overly broad no-solicitation/no-distribution work rule.

WE WILL NOT state to unit employees that there is no union representation at our Urethane Division facility.

WE WILL NOT lay off unit employees without providing the Union with notice and the opportunity to bargain over these layoffs.

WE WILL NOT issue disciplinary actions to and discharge our employees because they engage in activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, formally rescind in writing our overly broad no-solicitation/no-distribution rule in effect from April 1996 through March 12, 1997.

WE WILL, within 14 days from the date of the Board's Order, offer Michael Hooper, Kenny Smith, Nicole Wadley, and Latonia Ware full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Annette Cooper, Carl Jennings, and Annie O'Neal full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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[1] The purpose of that meeting was to give Jennings three warnings, which the Respondent had previously prepared and cleared through the union representative. I find no support for my colleagues' contention that Jennings' fourth offense (for clocking out early, and thereby abandoning his work station) must not have been viewed by the Respondent as serious because it was not specifically discussed at this meeting. On the contrary, it was precisely because of the Respondent's strong reaction to this fourth infraction (which reaction was clearly communicated to Jennings) that the Respondent held the meeting to present Jennings with the earlier prepared and cleared warnings. The fact that the fourth infraction was not mentioned at the meeting does not contradict the fact that it was *the cause* of the meeting. As noted, the meeting itself involved only warnings that had been previously prepared and cleared. Thus, there was no need to mention that fourth infraction.

[2] One of the offenses involved the use of profane language and gestures. I agree that such conduct alone had not previously resulted in discharge. Nor did it do so here. It was simply one of a series of events that led to discharge.

[3] In my view, it is immaterial whether, months after the discharge, the Respondent discovered some exculpatory evidence towards O'Neal on which it failed to act. The allegation is that the Respondent unlawfully discharged O'Neal, not that the Respondent failed to reinstate her after discovery of allegedly exculpatory evidence. Thus, the evidence is to be assessed at the time of the discharge.

WE WILL make Michael Hooper, Kenny Smith, Nicole Wadley, and Latonia Ware whole for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest.

WE WILL make Annette Cooper, Carl Jennings, and Annie O'Neal whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings and discharges of Annette Cooper, Carl Jennings and Annie O'Neal, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

BECKER GROUP, INC., URETHANE DIVISION

Dennis R. Boren, Esq., for the General Counsel.
Jerry R. Hamling, Esq., of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Detroit, Michigan, on July 14–16, 1997. The charge was filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (UAW or the Union) on October 3, 1996, and amended on October 29, 1996.[1] The complaint was issued on November 21. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Becker Group, Inc., Urethane Division (Becker or Respondent), a corporation, engages in the production of parts for automobiles at its facility in Sterling Heights, Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues for Determination

Respondent maintains a facility in Sterling Heights, Michigan, where it manufactures various automobile parts. This facility was the subject of an organizational drive by the Union beginning in July 1995. This drive was initiated by Respondent's employee Annette Cooper, who first contacted the Union. Informational meetings were held with interested employees at a local fast food restaurant, the UAW's Region 1 conference room and at Solidarity House. On July 28, 1995, employees Cooper, Carl Jennings, and Annie O'Neal signed authorization cards. During the organizational campaign, these three employees wore union buttons, shirts, and hats on occasion and distributed union literature and paraphernalia during their shifts. They also distributed authorization cards outside of Respondent's facility during the campaign. The Company took no position with respect to the organizational effort and did not oppose it.

The NLRB election was held on July 11, and O'Neal and Cooper served as the sole observers for the Union. The Union was certified by the Board on July 19. Since that date, the Union has remained the exclusive collective-bargaining representative for Respondent's employees in the following described unit:

> All full-time and regular part-time production and maintenance employees, including quality inspectors, employed by Respondent at its Urethane Division facility; but excluding office clerical employees, managerial employees, professional employees, foam technicians, sales employees, confidential employees, guards and supervisors as defined in the Act.

In this setting, Respondent is alleged to have taken the following actions in violation of the Act:

1. Since about early April, until March 12, 1997, it maintained an overly broad no-solicitation/no distribution work rule.
2. About July 31, it laid off unit employees Michael Hooper, Kenny Smith, Nicole Wadley, and Latonia Ware without providing the Union with notice and the opportunity to bargain over these layoffs.
3. About mid- or late September, by its agent, Michael Zelenock, stated to a unit employee, who was also a unit officer of the Union, that she should give up her position with the Union.[2]
4. About September 30, by its agent, Mark Smith, ordered a unit employee, who was also an officer of the Union, to cease engaging in union activity and to leave a disciplinary meeting where she was engaged in representational activity.
5. About September 30, by its agent, Mark Smith, stated to unit employees that no union representation was at Respondent's Urethane Division facility.
6. About October 1, by its agents, Michael Zelenock, Alex Risca, Anne Ventimiglio-Esser, and Mark Smith, issued disciplinary actions to, and discharged employee Carl Jennings.
7. About October 1, by its agents, Michael Zelenock, Anne Ventimiglio-Esser, and Mark Smith, issued disciplinary actions to, and discharged employee Annette Cooper.
8. About October 1, by its agents, Alex Risca, Michael Zelenock, Anne Ventimiglio-Esser, and Mark Smith, issued disciplinary actions to, and discharged employee Annie F. O'Neal.

B. Did Respondent Adopt and Maintain an Overly Broad No-Solicitation/No-Distribution Rule

The first issue to be addressed is whether, since about early April and continuing until March 12, 1997, Respondent maintained an overly broad no-solicitation/no-distribution rule in violation of Section 8(a)(1) of the Act. Specifically, Respondent's work rules provide that violation of any rule will lead to a disciplinary step. Prior to March 12, 1997, general work rule 22 prohibits: "[E]ngaging in verbal or written solicitation for any cause or any purpose on Company premises at any time. Distribution of literature of any kind is also prohibited at any time on Company property."

[1] All dates are in 1996 unless otherwise indicated.

[2] Respondent has admitted the Sec. 2(11) supervisory status of Urethane Division General Manager Thomas Hunt, Plant Manager Alex Risca, Production Manager Michael Zelenock, Human Resources Manager Anne Ventimiglio-Esser, Production Supervisor Marc Fortin, and Production Supervisor Mark Smith.

In *Staco, Inc.,* 244 NLRB 461 (1979), the Board approved the administrative law judge's finding that similar language constituted an overly broad rule. Id. at 468–469. Further, *Staco* held that "[t]he mere existence of an overly broad rule tends to restrain and interfere with employee rights under the Act even if not enforced." Id. The work rule in *Staco* reads: 17. "Soliciting, or collecting funds for any purpose on Company time unless cleared with the Manager." Id. at 468. The judge found that "[t]he Board has found that the term `Company time' is `unduly ambiguous' and tends to connote all paid time from the beginning to the end of the work shift, and can easily be interpreted as a restriction on solicitation during breaktime or other periods when employees are compensated although not actively at work." Id. at 468–469, citing *Florida Steel Corp.,* 215 NLRB 97, 98–99 (1974).

Further, in *Custom Trim Products,* 255 NLRB 787 (1981), the Board found that the following work rule was overly broad and unlawful: "No distribution of any kind, including circulars or other printed materials shall be permitted in any area at any time." Id. at 788. The Board reasoned that this result was necessary although "the rule was corrected" at a later point in time and "the record contain[ed] no evidence indicating that the rule was implemented." Id. The Board held "that the rule's mere existence tended to 'inhibit the union activities of conscientious minded employees,'" citing *Automated Products, Inc.,* 242 NLRB 424 (1979).

Respondent's general work rule 22, although not identical to the language of the overly broad work rule in *Staco,* supra, is similar and is as ambiguous and far-reaching as the *Staco* work rule. There is little difference between "on Company time" and "at any time," except that "any time" refers to all "Company time" as well as all personal time. In *Custom Trim Products,* supra, the work rule held overly broad specifically reads "at any time" as in the instant case. Therefore Respondent's general work rule 22 was clearly overly broad through March 12, 1997, even though it was not enforced, as it is well established that the mere existence of an overly broad rule, though not enforced, constitutes an unfair labor practice.[3] *Staco, Inc.,* supra.

C. Did Respondent Unlawfully Lay off Employees in July

In *Lapeer Foundry & Machine, Inc.,* 289 NLRB 952 (1988), the Board held that "an employers decision to lay off employees for economic reasons is a mandatory subject of bargaining and that the Respondent violated the Act by failing to bargain over its layoff decision and the effects of that decision." Id. at 953. The Board then found that "[i]n deciding to lay off employees, management directly alters employees' terms of employment." Id. Since "a union has control . . . over labor-related factor[s], it can offer alternatives to the layoff . . . although management has a legitimate concern with the need for speed and flexibility in effectuating a layoff to remedy its economic plight." Id at 953–954. As a remedy, the Board held that the Employer had to "bargain with the union concerning the layoff decision, as well as the effects of that decision, and to reinstate the laid-off employees with backpay." Id. at 955. The backpay was then calculated "from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere."

On July 31, 2 weeks after the Union was certified as the unit employees' collective-bargaining representative, employees Michael Hooper, Kenny Smith, Nicole Wadley, and Latonia Ware were laid off by Respondent.[4] Because of a change in customer requirements, Respondent found that it no longer needed to run two shifts on its number 41 production line. Accordingly, it determined to eliminate one shift, creating a need to move eight employees. Based on seniority, it dealt with the situation. Four employees were shifted to other jobs. Four employees were laid off. These employees had been employed from 2 to 3 weeks and were considered probationary employees. Forms signed by these employees state that they are "at will" employees. Respondent contends that the layoff was permanent and that the laid-off employees were essentially terminated.[5]

Human Resources Manager Ventimiglio-Esser testified that she and employee Annie O'Neal discussed the matter of the layoff on July 30, 1 day prior to its taking place. Ventimiglio-Esser was not sure that O'Neal passed on the information to the union official named in the petition for representation, Leatha Larde. Ventimiglio-Esser was aware that Larde was the person designated as its representative at the time. Other than this alleged conversation, no other notice was given to the Union about the layoffs prior to them taking place. At the time of the alleged conversation, O'Neal held no position with the Union. On the date of the layoffs, O'Neal was elected to a representational position with the Union, but this fact was not made known to Ventimigilo-Esser until August 2.

O'Neal was active on behalf of the Union and regularly dealt with Ventimiglio-Esser on behalf of other employees. However, she testified that she could not "bargain on the Union's behalf with respect to terms and conditions of employment" and had been told by the Union that the Union had to be informed directly of any changes in employees' terms and conditions of employment. Further, O'Neal denies receiving any notice from Ventimiglio-Esser about the layoffs. She credibly testified that she first learned of the layoffs when asked by another employee to complain to Respondent about the fact that it was hiring while employees were still on layoff. She believes that this request was made sometime in August.[6] I credit O'Neals denial of prior notice. Ventimiglio-Esser's testimony in this regard is vague and there was no explanation of what would trigger such a conversation. Further, Ventimiglio-Esser testified that this conversation occurred sometime prior to the layoff; yet, she also testified that the decision to lay off was only made the day prior to its implementation, leaving precious little time for the conversation to have occurred. Having found

[3] R. Exh. 1, a revision of company work rules implemented on March 12, 1997, amends the language of work rule # 22 to comply with the Act. The existence of the overly broad rule prior to that date still constitutes a violation of the Act. *Custom Trim Products,* supra.

[4] The decision to lay off had been debated for about a week prior to this and the final decision was made on July 30.

[5] Respondent cannot change the National Labor Relations Act by its characterization of its employees as "at will" employees nor can it change its obligations under the Act after the Union's certification by such characterization of its employees as "at will," "probationary," or "terminated."

[6] Bargaining unit employees were hired on September 3 and 23. The charge underlying this complaint allegation was filed on October 3. On November 19, The Macomb Daily ran a "Help Wanted" advertisement for Respondent seeking factory help for the second and third shifts. However, the four employees that were laid off on July 31 were not recalled by Respondent.

that Respondent failed to give the Union any notice of the layoff and did not afford the Union any opportunity to bargain over the decision to lay off, or its effects, I found that it violated Section 8(a)(1) and (5) of the Act. *Lapeer Foundry,* supra. There is no question but that the layoff was occasioned by economic factors and no reason was shown by Respondent why it could not have given notice and bargained with the Union over the matter. Ventimiglio-Esser testified that management was debating the decision to lay off for at least a week prior to implementing the layoff. This period could have been used for negotiations over the layoff decision and/or its effects. In *Lapeer,* the Board stated, "In light of the economic circumstances motivating a company's decision to lay off employees, however, we will require that negotiations concerning this decision occur in a timely and speedy fashion. Thus, should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the layoff decision, we will find that the company has satisfied its bargaining obligation." Id. at 954. Thus, Respondent was afforded protection if the Union failed to promptly respond to notice.

Even though I do not credit Ventimiglio-Esser and find that the layoffs occurred without any notice to the Union, I further find that the alleged conversation with O'Neal would not satisfy Respondent's duty to notify the Union. First, at the time of the alleged giving of notice, O'Neal held no position with the Union which would have authorized her to deal with Respondent on behalf of the Union. Second, Respondent had never been informed by the Union that O'Neal was a designated agent for purposes of notification of unilateral actions affecting employees terms and conditions of employment and could not assume that notice would be passed on to the Union. Even though O'Neal had acted as an informal employee representative prior to the Union's certification, one cannot just assume she would understand the significance of the Union's role in a layoff situation. Third, even if the alleged conversation had occurred, it would have been on July 30, the eve of the layoffs. Such late notice, in light of the fact the decision to lay off had been debated for at least a week before, amounts to the notification of a fait accompli and does not satisfy Respondent's bargaining obligation. *East Coast Steel, Inc.,* 317 NLRB 842, 845–846 (1995); *Lapeer Foundry & Machine,* supra. The fact that Respondent took a week to make up its corporate mind about whether one was necessary belies any argument that it was in a situation of financial emergency. I find that Respondent violated Section 8(a)(1) and (5) by failing to give notice and the opportunity to bargain to the Union prior to its implementation of the layoff of July 31.

D. Did Respondent Violate the Act by Stating to an Employee That She Should Give Up Her Union Position

In September, Annie O'Neal was an elected union official, a fact known to Respondent since August 2. In September, while she was working at her station, she was approached by Respondent's production manager, Michael Zelenock. O'Neal testified that Zelenock started massaging her shoulders, telling her that she looked stressed out. She replied that she was tired. Zelenock then told her that "[y]ou should quit this job." O'Neal said she could not quit her job as she still had a child to put through school. Zelenock then said, "I'm not talking about the job, honey. I'm talking about the union business." O'Neal answered, "No way."

Zelenock nor any other witness testified about this incident and I credit O'Neal's testimony in this regard. However, I do not find that the statements of Zelenock violated the Act in their context. All the cases cited by the General Counsel involve actual or implied threats. There was nothing threatening about Zelenock's suggestion that she quit her steward's job. O'Neal and Zelenock had enough of a relationship that he would feel free to massage her shoulders and express concern about her health. For her part, O'Neal evidently did not object to Zelenock's actions and agreed with him that she was stressed out and was tired. In this apparently friendly context, he suggested that she quit her steward's job, obviously implying that it was stressing her out and making her tired. O'Neal did not testify that she considered the statement a threat of any sort. I will recommend this complaint allegation be dismissed.

E. Did Respondent Violate the Act by Discharging Carl Jennings, Annie O'Neal, and Annette Cooper

On October 1, Respondent discharged the three named employees, all elected unit employee officials of the Union. Annie O'Neal was a steward and Carl Jennings and Annette Cooper were two of the three member employee bargaining committee, with Jennings designated as chairperson. The legal basis for determining whether these discharges were unlawful under the Act is set forth in *Wright Line,* 251 NLRB 1083 (1980), which states that, initially, the General Counsel must establish a prima facie case sufficient to support the inference that the individual's protected conduct was a "motivating factor" in the employer's decision to terminate him or her. Such a burden is met by a showing that the employee engaged in protected activity, that the employer knew of such activity and harbors animus against the activity or the union. If the General Counsel has satisfied this requirement, the burden then shifts to the employer to establish that the employee would have been discharged "even in the absence of protected conduct."

Before discussing the facts surrounding each discharge individually, there are certain facts common to all three. First, the three employees were among a handful of the most vigorous supporters of the Union in the plant. Each participated fully in the campaign, attending meetings, wearing union paraphernalia at the workplace, distributing union literature at the workplace, and soliciting fellow employees to sign union authorization cards. Cooper and O'Neal were the union observers at the election. Cooper and Jennings were elected by the employees to be members of the initial employee bargaining committee and O'Neal was elected to be a steward. On October 1, they were three of only four union employee representatives in the plant. That all three were discharged on the same day, on the eve of the beginning of negotiations for an initial contract, is an almost overwhelming coincidence.

Local Union President Anthony Feyers testified that losing the three just prior to beginning negotiations had a substantial adverse impact on the Union's ability to bargain. The three employees had been instructed in the negotiation process and, more importantly, were leaders in the plant.[7]

[7] Respondent can argue that the discharges had a minimal effect of bargaining as it allowed the discharged employees to participate in negotiations. However, they did not participate. Not being employed at Becker, they had to try to find employment elsewhere and undoubtedly, their hearts would not have been into the negotiations for a contract which would not affect them.

1. The discharges of Carl Jennings and Annette Cooper

Both of these employees were discharged on October 1, as a result of certain incidents that occurred the day before, September 30. They will be discussed together as they are related.[8]

a. Cooper and Jennings meet with Ventimiglio-Esser

Cooper had worked for Respondent or its predecessor since February 26, 1995. As noted earlier, she was very active in starting the union campaign and remained so through to the election. She along with O'Neal were the union observers at the NLRB election. Jennings had been employed by Becker or its predecessor since 1993. He too was very active in support of the Union. On July 31, Cooper and Jennings were elected to the bargaining committee for the Union and this fact was communicated to Respondent on August 2. On September 30, Cooper and Jennings met with Ventimiglio-Esser in the human resources office. Jennings asked if she had received a letter dated September 26 from the Union naming the Union's bargaining committee and officers and proposing bargaining begin.[9] According to Cooper, Ventimiglio-Esser acknowledged that she had the letter and faxed it to Anna Showman, a Becker employee at another Becker facility. Ventimiglio-Esser could not remember this meeting and though acknowledging that she did receive the letter, could not remember when. However, General Counsel Exhibit 33 is a copy of the involved letter and has a received date of September 30 written on it and appears to have a fax date of September 30 on the bottom. I credit the testimony of Cooper and Jennings with regard to this meeting.

b. Jennings has problems on his work shift

Following the meeting on September 30, Jennings reported to work 2 hours early and worked on the first shift F 41 line. When this shift finished at 4 p.m., Jennings was told to report to his supervisor, Mark Smith. He found Smith and was told by Smith to run the water jet machine on the F 24 line because the regular operator was absent.[10] The water jet cuts automobile doors. Jennings job was to place molded doors on the machine correctly so that it cut correctly. Jennings ran a number of bad doors that had to be scrapped that evening. The machine was checked by technical people who determined that the machine was operating properly, so the fault lay with Jennings.[11] Steward and quality auditor Barbara Stephens was auditing this production line that evening and was the person who was rejecting doors run by Jennings. There is only one water jet machine on this production line, so that if the operator is missing, production stops. Jennings took a break at 4:30 p.m., which was not the time this line was to take a break. Smith found him and warned him he could be written up for taking breaks at other times than with the rest of the line personnel. He took at lunchbreak at 7 p.m., not at 8:30 p.m. when the rest of the F 24 line line took their break. During this period, another employee on the line ran the water jet. Jennings took a third break at 9:30 p.m., again not the proper time. Then he decided to punch out at 10:30 p.m., 2 hours before the quitting time for the F 24 line.[12]

c. Jennings receives disciplinary warnings

On September 30, Cooper worked her shift and at its end about 10:30 p.m., she went to the timeclock and punched out. Jennings was also there punching out. At this time, Production Supervisor Mark Smith came out of the nearby production office and asked Jennings where he was going. Jennings said he was going home. Jennings complained that he had worked his 8 hours and to stay until the end of the line's shift would mean he worked 10 hours. Smith yelled for Jennings to come into the production office. Cooper followed Jennings into the office to serve as his union representative, at Jennings request. When Smith called him into the office, Jennings knew he might be disciplined. Smith testified that before calling Jennings into the office, he had shown three warnings he planned to give Jennings to steward Barbara Stephens and she had no objection to them. He neither told Jennings and Cooper about this meeting nor did he tell them the purpose of the meeting was to give Jennings the warnings. They first learned that this was its purpose after the meeting was underway.

As the meeting commenced, Smith yelled at Cooper, telling her to leave. Cooper told Smith she was there to represent Jennings. Smith responded that there was no union representation and to get out of the office. Cooper replied that there was a union, the UAW, and it had been certified. Smith countered by telling her the Union did not have a contract. Cooper agreed, but told him that because the Union had been certified, Jennings had the right to union representation. Smith dropped his demand that she leave.

At this point in the confrontation, Maintenance Supervisor Gary Newman came into the office and sat on a table behind Jennings and Cooper. Smith then handed three disciplinary writeups to Jennings. Jennings read them and said they were not true and he refused to sign them for this reason. Smith again asked him to sign the writeups and Cooper interjected, telling Jennings it was his right not to sign them. Smith then told Jennings that the writeups were his copies and also gave him a copy of the Respondent's work rules. Cooper picked up the writeups and work rules and told Smith that they would have to take care of the matter in the morning.[13] After Cooper picked up the writeups, she and Jennings left the office and shut the door behind them.[14] Nothing was said by Smith about her taking the warnings though he knew she had them. From the evidence of record, it is Respondent's policy to give employees copies of warnings issued to them. Clearly the warnings Smith handed to Jennings were intended to be his at least at some point. There was nothing said in this meeting about any discipline being given to Jennings other than the writeups and no mention was made of the possibility of discharge. There was nothing said about any possible discipline being issued to Cooper.

[8] Respondent is also alleged to have committed two independent 8(a)(1) violations by its actions with respect to Cooper on September 30. These alleged violations will be discussed in this section.

[9] Insofar as this letter names Jennings and Cooper as bargaining committee members and Annie O'Neal as steward, it is identical to the letter Respondent received on August 1 or 2.

[10] In this particular production process, doors are first molded, then cut by the water jet and then finally assembled and shipped. It is a continuous line process.

[11] Smith testified that he believed that Jennings was deliberately running bad doors because he did not want to work on the water jet that night. However, this observation does not appear in any of the documentation surrounding Jennings' termination.

[12] Jennings had come to work with Cooper whose shift was from 2:30 to 10:30 p.m. Clearly, he quit early to ride home with her.

[13] Carl Jennings testified about this meeting and his testimony generally corroborates Cooper's description of what happened.

[14] The next day she sent these warnings to the Union.

d. Did Jennings have a right to union representation when given the warnings

At this point I will deal with two subsidiary issues that bear on the discharges of Jennings and Cooper. First the complaint alleges that Respondent, through Smith, violated Section 8(a)(1) of the Act by ordering her to leave his office and not represent Jennings and by his statement that there was no Union in the plant. It is well settled that an employee has a Section 7 right to request union representation at an *investigatory* interview where the employee reasonably believes that the investigation will result in disciplinary action. *NLRB v. J. Weingarten,* 420 U.S. 251, 270 (1975). The Board has held that *Weingarten* rights are not applicable to a meeting with the employer "held solely for the purpose of informing the employee of, and acting upon, a previously made disciplinary decision." *Baton Rouge Water Works,* 246 NLRB 995, 997 (1979). The Board has also held that when and employer "inform[s] the employee of a disciplinary action and then seek[s] facts or evidence in support of that action . . . the employee's right to union representation would attach." Id.

Under the facts of this case I find that Jennings did not have a right under *Weingarten* to have union representation. Smith had already prepared the warnings for Jennings and had previously shown them to Steward Stephens. The sole purpose of the meeting was to give the warnings to Jennings. There is no evidence that Smith intended to conduct any further investigation or seek any information from Jennings. Therefore, Smith was legally correct in contending that Cooper should leave. However, as noted above, he allowed her to participate in the meeting. I will dismiss the complaint allegation concerning Smith's direction to Cooper to leave the meeting.

However, I believe Smith's statement to Cooper and Jennings that there was no union representation at Respondent's facility constitutes an 8(a)(1) violation. The Union was certified as the exclusive collective-bargaining representative of the Becker employees on July 19, following the July 1 election. Respondent had received notification on August 2 and on approximately September 30 that the Union was the certified bargaining agent at the Sterling Heights facility and that specific employees had been elected to unit representative positions. An employer, or its agents, cannot arbitrarily decide that a union does not have a presence in the employer's facility. The certification by the NLRB provides a 1-year presumption that the union represents the employees for purposes of collective bargaining. The Act demands that bargaining in good faith occur. Logically, bargaining cannot begin as mandated under the Act unless the employer recognizes the union. Therefore, the union should represent the employees within the unit without employer interference or refusal to recognize the certified union for a minimum period of 1 year following certification. Had Smith merely informed Cooper that under the circumstances of the meeting, Jennings had no legal right to union representation, I would not find a violation. However, his statement went much further. Considering that the statement made by Smith occurred as Cooper was attempting to engage in union representation, there was a coercive nature to the statement. Such a statement has a chilling effect on a unit representative's ability to represent and on the employee's right to be represented, and thus constitutes an 8(a)(1) violation.

e. Jennings and Cooper have a confrontation with Steward Barbara Stephens

According to Cooper, after she and Jennings left the office, they walked toward an exit, passing through a production area. Near the exit door, the two had a confrontation with steward Barbara Stephens. Stephens approached Jennings and told him to wait a minute, it was not her fault. Jennings told her to get out of his face. Cooper told Stephens to be a union person, that she was not acting like a union person.[15] Stephens at this point said to Cooper, "Shut up, you bitch." Cooper replied, "Well, you're another one," and then she and Jennings left the plant. Cooper testified that at no time during this incident did Jennings make vulgar gestures toward Stephens nor did she curse at her.[16]

Stephens testified that after meeting with Smith, Jennings, and Cooper came to her station and Jennings grabbed his crotch and said, "Suck my dick, you bitch." According to Stephens, Cooper then grabbed Jennings and said, "Come on, fuck that bitch. We're going to get her." Stephens testified that she responded, "You don't have to wait to try to get off. You can get me now because I'm not scared of nobody."[17] Stephens denied using any profanity during the confrontation.

Two weeks after discharging Jennings and Cooper, Ventimiglio-Esser took a statement from employee Sonia Abrams, who Smith knew was present for the confrontation. Abrams, after relating information about certain job-related incidents occurring with Jennings on September 30 that management was not aware prior to the taking of the statement, wrote about the confrontation with Stephens. She wrote: "On Carl's way out he was walking with Annette. Barbara and I heard Annette say, 'I'm tired of her shit, she is always bossing people around.' Barbara said to me 'who the Fuck does she think she is, she ain't his wife.' Annette said, 'Fuck you Bitch' to Barbara. On the way out Carl and Annette were saying we'll see about this." Ventimiglio-Esser agreed that this statement contained no indication of a threat.

Smith testified that he left his office shortly after Jennings and Cooper for the purpose of escorting them out of the plant. Immediately after exiting his office, he heard loud voices, though he could not tell what was being said or by whom. By the time he got to the exit, Jennings and Cooper were gone. He did encounter Barbara Stephens and another employee Sonia Abrams. According to Smith, Stephens told him that Jennings and Cooper had come to her work station and Jennings had grabbed his crotch and made a rude remark to her. Smith did not ask Abrams what had happened so that his only knowledge of the confrontation was what Stephens told him.

After this incident, Smith decided that Cooper and Jennings should be terminated. He prepared two additional warning reports for Jennings and two such reports for Cooper. He also prepared two statements in support of the warnings. These were passed on to higher management who carried out the termination's.

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[15] Stephens had been named as a steward in the August 1 communication from the Union to Respondent. She was not named in the letter of September 26. Following this incident, she was removed from her position as steward by the Union.

[16] Stephens did not receive any discipline for her part in this confrontation.

[17] At the request of Ventimiglio-Esser, Stephens gave a statement of her knowledge as to what transpired on September 30 on July 10, 1997, a week before the hearing in this case.

f. Jennings and Cooper are discharged

Cooper came to work on October 1 in the company of Jennings. When they got to the plant, Cooper was met by fellow bargaining committee member Annie Pearl Smith. She informed Cooper that she and Jennings had been fired. Cooper wondered aloud why, since all she had done was represent Jennings. Smith told her that management had written a book on them. Cooper then found Jennings and they went to the office of Plant Manager Alex Risca. When they were in his office, Cooper asked to be represented by Annie Smith. Risca said no. At this point, Michael Zelenock and Ventimiglio-Esser came into the office. Cooper again asked for Annie Smith's representation and Risca relented. Zelenock left and returned with Smith. Cooper had taken out a tape recorder and in response to a question about it from Ventimiglio-Esser, said she wanted to record the meeting. Risca told her she could not tape the meeting and to put the tape recorder away. She gave it to Jennings who put it in his pocket. He began talking to Risca and the recorder fell out of his pocket and he picked it up and put it on the table. Ventimiglio-Esser noticed that it was on and said the meeting was over with, and for the two employees to come to her office. Ventimiglio-Esser's version of the meeting is essentially similar to that given by Cooper, except she indicated it was Risca who saw the tape recorder on and ended the meeting.

In Ventimiglio-Esser's office, she told Jennings he needed a lawyer as it was illegal for him to tape the meeting. Jennings apologized and Ventimiglio-Esser told him again he needed a lawyer and promptly terminated the employees. At no point prior to termination did anyone in Respondent's management listen to either Cooper's or Jenning's version of what had transpired the night before.[18] At this point, Zelenock came in with Smith. Cooper was asked to read and sign the termination paper. She read it and refused to sign, saying it was not true.

g. Respondent's reasons for terminating Cooper and conclusions with respect to those reasons

The decision to discharge Cooper was based on the two warnings given to her by Smith and a statement he prepared in connection with the warnings.[19] Other than Smith and Newman, no one talked with Stephens about the confrontation. Abrams was asked about it 2 weeks after the termination.

Smith's statement prepared with respect to Cooper reads:

> This employee (Cooper) has not had previous discipline problems. Her actions in the attached incident, however reflects a serious Becker employee standard attitude, i.e., lack of respect for management; unwilling to follow company rules; lack of social responsibility to fellow employees. Any one of the three infractions occurring in a single incident could have been dealt with in a counseling session resulting in mutual understanding of the consequences of an additional infraction. But viewed as a whole, I believe it is in Becker's best interest to terminate her. We would not be violating any state or federal laws in doing this. No employee is valuable to the point of accepting this behavior. We, as management, should support this as a team. This incident occurred in front of a witness, and then the entire shift. It is an opportunity for us to show mutual support, and to set an example of acceptable behavior within our organization. Be sure the employees in these plants will be watching for signs of weakness on our behalf.

The first warning prepared by Smith concerning Cooper accuses her of "theft." In the warning form's "Company Statement" box, it reads: "Annette in my presence removed employee warning reports from my desk and left the building. They are legal company documents that she has no right to possess. Signed Mark Smith." In all the years I have been hearing reasons for the termination of an employee, this is perhaps the most absurd reason I have ever been given. The warnings were intended to be given to Jennings and what he did with them was his business. Smith had other copies and they were produced at hearing. Moreover, Smith did not tell Cooper she could not take them and to date she has not been asked to return them. I believe this trumped up warning clearly points out the Respondent's animus toward the union activity of Cooper.

The second warning prepared for Cooper reads: "Annette Cooper would not leave production office of 6200 building when asked. She became abusive and insubordinate in her refusal." Based on the credible evidence about the meeting in question, which I find to be Cooper's testimony, there was nothing abusive and insubordinate about it. She was asked to leave, she said she was there giving union representation to Jennings. Smith said there was no union representation and she pointed out that the Union was certified. Smith changed his mind and let her stay. He did not warn her that her actions would result in discipline at the meeting. Though I have found that Jennings did not have a *Weingarten* right to union representation, I find that Cooper was engaged in protected activity in attempting to represent him. Cooper was a union representative with authority to act on behalf of employees. Going into the meeting, Cooper did not know its purpose which could very well have been investigatory. Once there, if he had explained the purpose of the meeting, Smith had the right to ask her to leave the meeting. But he did not have the right to punish her for trying to represent Jennings. Cooper did not refuse to leave the meeting and have to be forced out, Smith changed his mind and let her stay. Thus, the only things she could have done that constituted lack of respect for management was to engage in protected activity and to take the warning forms. Jennings had a right to have the forms and though Cooper took them in plain sight of Smith, he said nothing about not taking them.

Animus is also clearly evident in Smith's statement set out above. After referring to Becker employees' "standard attitude" as "lack of respect for management, unwilling[ness] to follow company rules, and lack of social responsibility to fellow employees," Smith accuses Coopers of demonstrating this attitude. The matters of lack of respect for management and unwillingness to follow company rules must refer to Cooper's attempt at union representation, a protected activity. Moreover, his warning contained in the last sentence of his statement drips with animus. "Be sure the employees in these plants will be watching for signs of weakness on our behalf." He is clearly referring to what he conceives is the appropriate response to union activity in the plant. Based on Smith's statement and the totally false

[18] Ventimiglio-Esser testified that Jennings was beginning to tell his side of the story when Risca saw the tape recorder and abruptly ended the meeting. It is undisputed that Jennings and Cooper were not thereafter allowed to explain what happened.

[19] Ventimiglio-Esser may have spoken with Newman before the terminations. Based on his testimony in this record, he could have added nothing with respect to Cooper that was not in Smith's written documentation.

accusation of "theft" on the part of Cooper, I find that she was discharged for her actions in trying to represent Jennings and for no other reason.

The other reason given for her discharge is set out in the third warning prepared by Smith regarding Cooper. It states: "Annette used abusive and vulgar language towards Barbara Stephens." Smith did not and does not know if this is true. He took the word of Stephen's and never asked Cooper, or Jennings, about the matter. He did not even ask Abrams, a bystander. If he had, he would have found that based on her description of the event, Stephen's was lying. This lack of any interest on the part of Respondent to investigate the matter totally belies its position that legitimately formed a basis for Cooper's discharge.

Moreover this record is replete with evidence that profanity between employees, and even between supervisors and employees, is rampant in the facility. By way of example, Cooper testified that she had heard employees say to fellow employees "bitch," "motherfucker," and guys saying "suck my dick," while grabbing their crotches. She had observed Supervisor Gary Newman grabbing his crotch and say to an employee "suck it." She has observed Supervisors Mark Smith, John Gorvey, and Michael Zelenock observe employees engaged in the use of such profanity. She testified that both Mark Smith and Gary Newman had used profanity toward employees, with Newman engaging in such conduct regularly. She also noted an instance when Sonia Abrams cursed out Mark Smith and threatened him. Abrams was not disciplined for this incident. Jennings also testified about the use of profanity in the workplace and his testimony was essentially similar to that of Cooper. He added that he had heard supervisors, including Mark Smith, call employees "dumb ass" and say to employees "fuck" and "suck my dick." Annie O'Neal offered similar testimony. She added that she had observed Abrams and another employee engage in a heated argument cursing each other and attempting to fight. This was also observed by supervisors. No one was disciplined over this incident. Annie Pearl Smith testified that she had observed Plant Manager Risca use such words as "motherfucker" and "asshole." Such tolerance for profanity, coupled with the total lack of investigation into the Cooper-Stephens incident strongly support my belief that only Cooper's protected activity was the motivation behind her discharge and I so find. The General Counsel has made a compelling showing under a *Wright Line* analysis that union animus was a motivating factor in Respondent's decision to terminate Cooper. Respondent has offered no credible reason for the discharge other than engaging in protected activity and thus I find that it discharge its employee Annette Cooper in violation of Section 8(a)(1) and (3) of the Act. As I have found that all the warnings issued to Cooper were unlawfully motivated, I will recommend they be rescinded.

h. Respondent's reasons for terminating Jennings and conclusions with respect to those reasons

Jennings was terminated on the basis of Smith's decision to terminate him. On the night of September 30, Smith prepared five warnings, a marked copy of certain work rules, and two statements concerning Jennings. Three of the warnings were prepared prior to the disciplinary meeting with Jennings and the other two after that meeting. The warnings which were shown to Jennings at the meeting read as follows:

> 1st. For "tardiness, took an unauthorized break." "Carl was not instructed or authorized a break at 7:30. He has been instructed to take breaks at the same times that 2nd shift does, and that his shift hours are 4:00 until 12:30." "This is a first notice."
>
> 2nd. For "carelessness, tardiness, work quality." "Carl is not checking his work after removing doors from WJ (Water Jet Machine). He was told at 4:45 on 9-30 by Doug Bannerman how to get right hand door on properly. He was told by Mark Smith at 8:00 that he was still doing it wrong and had to check that he was doing it properly."
>
> 3rd. For "disobedience, tardiness." "Carl refused to follow my instructions at 7:30 when he was told to take breaks with the rest of the shift."

The work rules that Smith accused Jennings of violating are as follows:

> a. Inability to perform at a level equal to that of other employees of the same time and grade.
>
> b. Making scrap unnecessarily, careless workmanship or hiding or throwing away scrap rather than reporting it to management.
>
> c. Falsifying or failing to prepare production cards.
>
> d. Refusal to do assigned work as instructed by management.
>
> e. Restricting output or attempting to restrict the amount of work performed by others.

Though the latter two alleged violations by Jennings are grounds for immediate discharge, the three warnings prepared before Smith called Jennings into his office reflect that no discipline was contemplated by Smith until after Jennings and Cooper entered his office. After Jennings and Cooper left, Smith prepared two more warnings for Jennings. The first of these reads: "Carl punched out at 10:30, leaving his work station abandoned, without my permission." This warning has nothing in the portion where discipline would be indicated. Smith testified that he had no intention of terminating or giving any other discipline to Jennings than that shown on the previously prepared warning forms as they went into the meeting. As the matter of punching out 2 hours earlier was then within Smith's knowledge, I find Smith intended to do nothing more about this incident than issue another warning. The form itself so indicates as it has no notation for any action to be taken.

The last warning prepared by Smith regarding Jennings refers to the confrontation with Stephens. It, reads: "Carl used abusive vulgar language while grabbing his crotch directing it towards Barbara Stephens." For all the reasons I discredited this alleged reason for Cooper's discharge, I found it equally pretextual as a reason for Jenning's discharge. As was the case with Cooper, I find that the meeting itself and the attempt by Cooper to interject the union in the matter triggered Jennings discharge. The statements prepared concerning Jennings, as well as the one prepared with respect to Cooper support this finding.

The first statement written by Smith about Jennings reads:

> Carl Jennings further indicted himself at 10:30 p.m. As I was finishing his write-ups he had paged me to F-24 WJ. I went there, and he informed me that he was punching out and going home. I told him that he was walking off the job and that his scheduled hours were 4:00 to 12:30. (Carl, in the week of 23rd of Sept. was voluntarily coming in at

> 2:30 and leaving late to help run WIP for prod.) He told me that he came in at 2:30 and he had his 8 hours in. I told him he still has to work his assigned shift. I took Carl in the 6200 Bldg. production office to counsel him and give him his warnings. Annette Cooper followed us in. I told Annette that this matter didn't concern her, and asked her to leave. She informed me that she was a union representative and she wouldn't leave. I handed Carl his warning slips and asked him to read them. He read the first one and put it on the desk, and without reading the rest he threw them on the desk and said he disagreed. Without even seeing the documents (reading them) Annette grabbed the warnings (and a copy of company rules where I had x'd his violations) and informed me that we would see about this tomorrow. They left the office in a rush. I gave them 20 seconds to leave premises, then I went to follow them to make sure they didn't disrupt the rest of the shift. Upon leaving the office I could hear loud screaming in the plant. I walked towards the back door by E. A. Foam to find Carl and Annette so I could escort them quietly out. While doing this Barbara Stephens, Quality Auditor 2nd shift, approached me in a highly excitable state. She told me that Carl and Annette had approached her on their way out of the building blaming her for Carl's problems. Carl grabbed his crotch and made obscene remarks to her, and Annette yelled obscenities at her. Gary Newman was my witness to all of the above.[20]

Smith also prepared an addendum to this statement, which reads:

> This employee (Jennings) has had several previous verbal warnings concerning both his work ethics and his behavior. His actions in the attached warnings are unforgivable and in total contrast to what we, as management, are trying to achieve. I highly recommend termination of this employee. It would be in Becker's, and its employees, best interest. This employee is rebellious and uncooperative.

Smith testified that Jennings was fired for the warnings taken as a whole and not just one incident. On the other hand, he testified that as he entered the office with Jennings he did not intend at that time to fire him. His statement as set out above indicate that only counseling was being considered prior to the meeting. Jennings at this point had done everything for which he received a warning other then have a confrontation with Stephens and the meeting itself. I do not question the right of management to terminate Jennings for his behavior on the night of September 30 up to the point of the meeting. He had in fact committed a number of violations of legitimate company rules which would have justified discharge. The point is, however, Smith was not going to discharge him until they had the meeting. I believe that Cooper's protected activity so upset Smith that he decided to fire the two employees involved in the meeting. This is best shown in the case of Cooper who did absolutely nothing that would justify termination. It is shown in the case of Jennings by the timing of the decision, only after the meeting.

As was the case with Cooper, Smith's written statement provides insight into motivation. Smith wrote: "I highly recommend termination of this employee. It would be in Becker's, and its employees, best interest. This employee is rebellious and uncooperative." The only "rebellious and uncooperative" thing that Jennings did at a point in time when Smith felt he only needed counseling was attend the disciplinary meeting with Cooper.

Respondent offered certain evidence of other discharges to show that it discharged employees other than Jennings for similar offenses. I do not believe they support Respondent's position. Ventimiglio-Esser testified that an employee, William Fanson, was fired for shouting obscenities at two fellow employees and then pulling a knife, threatening them with it. He is the only employee fired for threatening other employees.[21] Other employees, Jamail Carter, Aaron Waddles, Daryl Young, and Rondell Whitely, were fired for making a threats to supervisors. Carter was fired for telling a supervisor he "was going to knock him upside his head."

Aaron Waddles was fired for repeatedly refusing to work. Beginning on July 9, 1996, Waddles was warned for becoming abusive to a supervisor and refusing to do a job to which he was assigned. On July 14, he was warned for failing to properly perform three different jobs. On July 21, 1996, he failed to do a job properly, left his job without permission, and accused the supervisor of sexual and racial harassment. On July 25, he was warned for failing to start work on time. On July 30, a supervisor found this individual in the parking lot 5 minutes after he was supposed to go to work. He was told to report to work, but refused and went home. Mark Smith wrote out a warning calling this a voluntary quit.

Rondell Whitely was fired for insubordination. He got into an argument with his supervisor and refused to perform an assigned task. He was belligerent and continued arguing with the supervisor, finally saying he "was tired of this fucking place." The supervisor then left and had him fired.

Daryl Young was fired for insubordination. Young had repeatedly refused to do jobs and was approached by a supervisor to do a job and refused. The supervisor wrote, "He became very loud and got up into my face saying he would not do the job." The supervisor told him he was suspended and Young refused to leave. The supervisor started to call the police and Young left.

Each of the examples given above are far more egregious, in my opinion, than the behavior of Jennings on September 30. The decision to terminate Jennings and Cooper made by Risca and Ventimiglio-Esser was based on the warnings issued by Smith, the statements written by Smith, and a talk with Gary Newman, Doug Bannerman, and Dennis Bruce. The latter two individuals are technical persons who checked the water jet on the night of September 30 and who also had checked doors Jennings was cutting. As was the case with Cooper, I believe Jennings was terminated at least in significant part out of union animus. I do not find that he would have been terminated in the absence of the events of the disciplinary meeting. That is the event which triggered the termination process. I find that by terminating employee Carl Jennings Respondent violated Section 8(a)(1) and (3) of the Act. To the extent that the complaint alleges that Respondent violated the Act by issuing discipline

[20] In fact, Newman was only present for the events that took place in the office. He did not accompany Smith to the exit.

[21] There is no mention of any threats being made by anyone in the documentation of the discharges of Jennings and Cooper. There was some testimony at the hearing that an alleged threat was made. Even if true, and I do not credit any testimony that a threat was made, it was not within the knowledge of Respondent at the time of discharge.

reports to Jennings, I disagree, except for the one given for allegedly engaging in abusive behavior toward Stephens. He did in fact do the things for which he received the first four warnings on September 30 and they were not shown to be motivated by animus. As I found above the animus surfaced after he had already been warned, at least verbally, about each such rule violation. I find that the warning with respect to Stephen's was unlawfully motivated and will recommend that it be rescinded.

2. The discharge of Annie O'Neal

Annie O'Neal was employed by Becker or its predecessor from March 1994 until her discharge on October 1. She was the third union employee representative fired on this date. O'Neal was allegedly fired for punching in the timecards of three other employees on October 1. The are various sides to this story.

Annie O'Neal first related the relevant events of that day. According to O'Neal, she reported to work on October 1 at about 5:40 a.m. for a shift starting at 6 a.m. She went to the timeclock to punch in with another employee Nikki Wallace, arriving at the clock at about 5:42 a.m. She and Wallace talked. While they were talking, three other employees arrived, Donna Willams, Tinelda Williamson, and Linda Young. They went to the clock to punch in and O'Neal told them they were cutting in. Williamson responded that O'Neal was just talking. While Williamson was talking, O'Neal punched in. She observed Donna Williams punch in. Williams, Williamson, and Young then walked toward the door and Williamson turned, announced that the three were going to a gas station, and asked O'Neal to put their cards with hers. She pulled their cards and put them with hers in one slot of the rack for timecards.[22] Nikki Wallace then punched in and she and O'Neal went to work.

Later that day at about 10:40 a.m., O'Neal was working at her machine when Michael Zelenock approached and said he needed to see her in the conference room. After they arrived there, unit employee Monica Hughes came in followed by Ventimiglio-Esser. O'Neal asked Hughes why she was there and Hughes said she did not know, that she had been summoned by Ventimiglio-Esser. Ventimiglio-Esser said Hughes was there because she was an alternate committee person and O'Neal needed representation. O'Neal argued that Annie Pearl Smith was her alternate and Ventimiglio-Esser decided she was right and sent Hughes to get Smith. When Smith arrived, Ventimiglio-Esser told O'Neal that she had been observed punching in other employees' timecards. O'Neal inquired as to who had accused her of that and she was told it was Supervisor Marc Fortin. O'Neal then asked for him to be brought in and Zelenock went and found him. According to O'Neal, she confronted Fortin and he lowered his head and mumbled something. Smith asked him why he didn't say something to O'Neal when he observed her punching in the cards. Ventimiglio-Esser interjected, "He didn't have to. He had to wait until I got her because I'm the Human Resource." Smith began to ask Fortin another question and O'Neal stopped her saying not to argue with them. Smith proceeded to ask Fortin how he could have seen her and he mumbled, "I seen her with them in her hands." O'Neal then told Ventimiglio-Esser that she knew this was a lie and Ventimiglio-Esser responded that she was not there.

O'Neal and Smith then met with Risca. Risca told them that the matter had been brought to his attention and all his subordinates agreed on termination and he was sticking with the company position. According to O'Neal, Risca then told her to contact the Union, adding, "if you wait six months, I'll clear your record and hire you back." She then left the plant. In the parking lot she had a conversation with a number of other employees including Nikki Wallace, Donna Williams, and Tinelda Williamson. They asked what happened and she related she was fired. She told them Fortin accused her of punching in the cards of Williams, Williamson, and Young. The three asked how that could be as they punched in their own cards, noting that no one from management had spoken to them about the matter.

The warning report supporting the termination states: "While completing morning start up in 6200 Building, I observed Annie O'Neal punching in four time cards, one being herself. This is a violation of Company Rule Section C–Letter J." The warning states "immediate discharge" and is signed by Fortin. O'Neal was also given a photocopy of the timecards of herself, Williams, Young, and Williamson. All showed to be punched in at 5:44 a.m. Wallace's card shows that it was punched in at 5:48. a.m.

The rule referred to makes it a violation resulting in immediate discharge to punch in the timecard of another employee. This rule was changed in 1997 to make it also an offense to knowingly allow another employee to punch in your timecard. It was also made an offense with no specified discipline level.

Fortin testified that on October 1 at about 5:40 in the morning, he was on the mezzanine of building 6200. From the point where he was standing, working on a hydraulic leak, he was about 20 feet above and 50 to 60 feet from the timeclock, with an unobstructed view of it. He observed O'Neal at the clock, looking around. According to Fortin, she then pulled out four cards and punched them one at a time, all the while looking around to see if anyone was watching. She then put all four cards back in the rack and left. Fortin then went to the rack and got the cards and photocopied them. At no time did he see Young, Williams, or Williamson at the timeclock on that day. He then reported the incident to Zelenock and Risca. He testified that the meeting with O'Neal and Smith, he was asked how he saw her. He testified that he did not answer.

Tinelda Williamson testified that on October 1, she rode to work with Young and Williams. When they arrived at the time clock she and the others found their cards had been punched. She denied that she asked O'Neal to punch her card or that she saw her near the timeclock. This testimony, first given to Ventimiglio-Esser about a week prior to hearing, is in complete contradiction of a statement she gave Ventimiglio-Esser on this subject on October 29. It reads:

> On that day (October 1), Linda Young Donna Williams and I drove together. We drove up to the 6200 side of the building and went in to punch in. Annie O'Neal was at the time clock at the time. We wanted to go to the gas station so we punched in and then asked Annie to put the cards back into the slots for us. We wanted Annie to put the timecards together to make it easier to punch out. There were other people in the building, Nikki Wallace

[22] O'Neal testified that only some of the slots in the racks had names on them and the employees wanted their cards to be together so they would be easier to find. However, appears to be the fact that each employees has an assigned card slot. It is Respondent's practice to gather up the cards daily and check the punch in time with the employee's supervisors to verify their accuracy. They are then put back in the rack in the assigned slots.

> was one of them. We walked past her. Hilda Gingiloski might have been in the building. I'm not sure. We went to the gas station and then when we returned we parked on the 6100 side of the building. Then we reported to work.

Williamson is still employed by Respondent and appeared at the hearing at the request of Ventimiglio-Esser. She was paid for the day. She also testified that between October 28 or 29, and July 7, 1997, she spoke with no one from management about this matter.

On October 28, Linda Young gave a statement to Ventimiglio-Esser which reads:

> That morning Tinelda Williamson and I pulled into the 6200 parking lot. We didn't even park the car, we just pulled up to the door. We ran into the 6200 building to push our timecards. Annie was standing by the timeclock, and Nikki Wallace was in the area. We punched in, then gave our timecards to Annie to put them together and went back into our car. We always put our timecards together so that it was easier to punch out at night. We then drove to the gas station and came back and parked on the 6100 side of the building. Then we reported to work.

No statement was taken by Respondent from Donna Williams. The first contact that Respondent made with Williamson and Young with reference to this matter was the date of their statements, almost a month after O'Neal was fired.

I believe that O'Neal was terminated as part of what I believe was an October 1 attempt by Respondent to weaken the Union's bargaining strength and credibility with employees by summarily firing its three most visible supporters in the facility. No other employee had been fired for punching in another employee's timecard prior to the termination of O'Neal, though this had been a problem at the facility for some time. No investigation into the matter was made before O'Neal was terminated even though she did not admit quilt. No reversal of this decision was made when Respondent belatedly asked two of the other three involved employees what happened and was told they punched in their own timecards. No discipline was issued to Williamson for giving a false personnel statement, though she clearly lied either in her October statement or in her testimony at the hearing.

Whether she did what she was accused of I cannot be totally sure. I certainly do not believe the testimony of Williamson. Not only is she a proven liar, but her testimony in this proceeding defies logic. If one believes her, O'Neal, without being asked, went to the timeclock and selected the timecards of three employees, apparently randomly, and punched them in without knowing whether the employees would report for work that day. I find this testimony incredible and do not believe it. Perhaps more telling on this point is that Respondent felt compelled to adduce this testimony and rely upon it, while not relying on the earlier two statements which supported the position of O'Neal.

Fortin's actions on October 1 are also questionable. First, he did not confront O'Neal when he saw her punch in the cards, if he did see her do so. He refused to say to her face that he saw her punch in the cards at the discharge meeting. He would only say he saw the cards in her hand, which is consistent with O'Neal's testimony and the October statements of Young and Williamson. As was the case with Williamson's testimony, one wonders why O'Neal selected the three cards to punch in, if, as contended by Fortin, he did not observe any of the three that morning near the timeclock. Moreover, he was some 60 feet away from O'Neal at the time she allegedly punched in the other cards and could not see whose cards she was punching in. He testified that after she left, he went and retrieved the cards, indicating to me that they had been placed in a slot together, also consistent with O'Neal's story. If she had placed them in individual slots, there is no way he could have found them unless he went through all the cards looking for ones with the same time on them. He did not testify he did this.

As noted above, it is also in O'Neal's favor that Respondent did not think the matter serious enough to even ask the other involved employees about it for a month. Although I agree that the written work rule did not call for punishment for an employee who let or had another employee punch in their cards, this is certainly activity that Respondent did not condone. That fact that its work rule revision now makes all parties to such action equally at fault makes this point. Yet Respondent did not even talk to these employees and when it did, it did nothing based on their answers.

O'Neal appeared to be a candid witness and I believed her testimony. I find that she did not punch in the other employee's timecards. I find that Respondent fired her as part of a plan to undermine the Union's strength in the plant and this was the reason she was discharged. Nothing that Respondent did with respect to the alleged incident for which O'Neal was discharged reflects any legitimate effort to address the underlying problem nor did it do anything to show that it cared whether the alleged rule violation was true and not. I find that as union animus was the motivating factor in O'Neal's discharge, Respondent violated Section 8(a)(1) and (3) by discharging this employee. As the warning given to her in support of the termination was unlawfully motivated, I will recommend it be rescinded.

CONCLUSIONS OF LAW

1. Respondent, Becker Group, Inc., Urethane Division, is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent engaged in conduct in violation of Section 8(a)(1) of the Act, by:

(a) Since about early April 1996, until March 12, 1997, maintaining an overly broad no-solicitation/no-distribution work rule.

(b) About September 30, by its agent, Mark Smith, stating unit employees that no union representation was at Respondent's Urethane Division facility.

4. Respondent engaged in conduct in violation of Section 8(a)(1) and (5) of the Act, by about July 31, laying off unit employees Michael Hooper, Kenny Smith, Nicole Wadley, and Latonia Ware without providing the Union with notice and the opportunity to bargain over these layoffs.

5. Respondent engaged in conduct in violation of Section 8(a)(1) and (3) of the Act, by:

(a) About October 1, issuing a warning to and discharging its employee Carl Jennings.

(b) About October 1, issuing disciplinary actions to, and discharging its employee Annette Cooper.

(c) About October 1, issuing disciplinary actions to, and discharging its employee Annie F. O'Neal.

6. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Formally rescind in writing its overly broad no-solicitation/no-distribution rule in effect from April through March 12, 1996, and post notice that this has been done.

The Respondent having laid off employees Michael Hooper, Kenny Smith, Nicole Wadley, and Latonia Ware without giving notice to the Union and affording the Union an opportunity to bargain over this decision and its effects, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily discharged its employees Annette Cooper, Carl Jennings, and Annie O'Neal, it must offer them reinstatement to the positions they held prior to their unlawful discharges without prejudice to their seniority rights and other benefits, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra, plus interest as computed in *New Horizons for the Retarded*, supra.

Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings issued and discharges of Carl Jennings, Annette Cooper, and Annie O'Neal and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

[Recommended Order omitted from publication.]